# The Panama Canal Treaties of 1977: Statements on the Senate Floor on June 5 and June 15, 1978 by Senator Jesse Helms

## The Panamanian "Understanding" Added to the Treaties

MR. HELMS: Mr. President, when President Carter goes to Panama tomorrow to sign the protocol of ratification for the Panama Canal treaties, he will agree to a Panamanian "understanding" that has not yet been revealed to the American people. It is an understanding of potentially great significance to the defense of the Canal; yet the American people will not have any inkling of its language, much less its significance, until after the President has committed the United States to accepting it.

Moreover, there has been no debate or discussion of the matter in the United States Senate about the ramifications of this "understanding," and no explanation to the Senate at large. It has been reported to me that the language has been held in the Foreign Relations Committee for a week, but no attempt was made to transmit the text to all Senators, nor even to those who were particularly active in the treaty debates.

What is the substance of this Panamanian "understanding"? The substance of it is basically that Panama understands the treaties obligations to be subject to the UN Charter and to the principles of the OAS Charter, and that any actions taken by either party to the Treaty to preserve the neutrality of the Canal or to reopen the Canal will be conducted accordingly.

What is the significance of this "understanding"? The significance is to confirm Panama's interpretation of the DeConcini reservation, revealed in the Panamanian communique of April 25, 1978. To put it more specifically, the understanding prevents us from using force to maintain the neutrality of the Canal when the threat to the neutrality of the Canal comes from the internal affairs of Panama.

Thus the "understanding" when seen in context actually forbids the United States from doing what is apparently allowed on the surface.

For, as the Senator from North Carolina has pointed out time and again, the

UN Charter and the OAS Charter requires all member nations to refrain from force or the threat of force in the settlement of disputes. They also require all member nations to refrain from threatening the territorial integrity or the internal affairs of another nation. Therefore, if the threat to the neutrality of the Canal comes from the internal affairs of Panama, the United States has no right to intervene.

This official "understanding" confirms that Panama interprets the essential points of the treaty in a manner diametrically opposed to the interpretation which induced the Senate to agree to the Treaties. It renders even more credible the dangers to U.S. interests presented by the communique of April 25, which the Senator from North Carolina presented to the Senate on June 5. The President has done a disservice to the American people by keeping this important condition imposed by Panama from the knowledge of the American people, all the time intending to accept that condition without any debate by the nation.

**The President's Trip to Panama**

MR. HELMS: Ten days ago I demonstrated on the Senate floor that the Republic of Panama, in an official communique issued April 25, has interpreted the language of the Senate changes in the treaties in a meaning exactly opposite the intent of the Senate. To date, no one has taken issue with any specific point of my analysis. Last Thursday, at the daily State Department press briefing, the Department spokesman, Mr. Hodding Carter III, merely issued an unsubstantiated denial. He said, with reference to the April 25 communique, "We do not believe that there exists a significant misunderstanding on the part of Panama as to the meaning of the Senate's actions." But even more significantly, he said that the communique "was not legally binding."

The statement of Hodding Carter could only have been made by a refusal to look at the facts. Anticipating Administration denials that any difference in interpretation exists, I took care to lay out in extensive detail the legislative history surrounding each of the six major changes which Panama has repudiated. Conceivably, reasonable opinions could differ on the exact weight which should be given to one or the other of the Panamanian commentaries. But the existence of massive disagreement on the fundamental issues presented by the Senate changes cannot honestly be denied. No one has yet pointed out any errors of presentation in my analysis; yet even if some were to be found in some particular or other, they would hardly undermine the main thesis: namely, that Panama sharply disagrees with the intent of the Senate in attaching various reservations and understandings to the Treaty.

Moreover, the disagreements are not over trivial matters; they are disagreements which go to the heart of the relationship with Panama, a relationship

which all agree must be built upon mutual respect and trust. The disagreements are over the rights of the United States to intervene when the internal affairs of Panama threaten the neutrality of the Canal, and over the compensation which Panama expects to receive. Frustrated expectations on either point will poison the relationship.

* * *

I make no pretense to be a spokesman for Panamanian politics, but it seems to me that the bitterness is about a treaty that is ambiguous—a treaty that seems to promise one thing, but implies something else. The opponents of the Torrijos regime obviously reject the implications; but the administration of President Carter appears to be depending upon exercising the full implications of the treaties to protect legitimate United States interests. But no such treaty can protect legitimate United States interests without wholehearted acceptance by the Panamanian people.

**Letter from State Department**

This morning I received a letter from Mr. Douglas J. Bennet, Jr., Assistant Secretary of State for Congressional Relations. This was in response to the letter which I wrote to President Carter on June 5. It is significant that the President himself did not put his signature on this letter. I did not write to Mr. Bennet, or even to the Secretary of State. For it is the President alone who is responsible for ratification of the treaties. With all due respect to the office of the Presidency, it appears to the Senator from North Carolina that the President himself should have responded on a matter of such grave importance that was courteously and conscientiously presented.

For the letter of Mr. Bennet actually agrees with me that disagreements exist, but says that we should go ahead and ratify the treaties anyway. In the key paragraph, Mr. Bennet says:

> Obviously, it will never be possible to achieve a complete identity of interpretation with respect to every one of the complicated provisions embodied in the Panama Canal treaties, the ancillary agreements, the annexes and other notes, and the instruments of ratification. We cannot on that account fail to proceed conscientiously to carry out the decisions of the two countries, reached through their respective constitutional processes. As the Treaties come into effect, some difficulties will certainly arise. We are confident that, with the same good faith and persistent effort evidenced by both sides during the Treaty negotiations, they will be surmounted.

However, the Senator from North Carolina did not call for "complete identity of interpretation with respect to every one of the complicated provisions"; I called only for the withdrawal of six Panamanian interpretations that were manifestly contrary to six key amendments upon which the Senate based its approval of the treaties. Presumably, all the other provisions were negotiated

to a point where there was a reasonable identity of interpretation. The work of the Senate, however, was not the fruit of negotiation, and the President has a moral obligation to see to it that Panama accepts the Senate's work according to the Senate's intention. Otherwise, the President will be breaking faith with the Senate and undermining its Constitutional role.

On other matters, Mr. Bennet's letter skillfully avoids the issue by rebutting arguments that I never made. For example:

> We do not regard the Panama communique as a repudiation or rejection of the Senate resolutions of ratification of the Treaties. The communique consists of a point-by-point description of the items contained in the resolutions, together with a commentary. It has no legal force.

The Senator from North Carolina does not regard the communique as a repudiation or rejection of the Senate resolutions of ratification of the Treaties. I said that Panama rejects the six Senate amendments in the sense understood by the Senate. Indeed, I said specifically that Panama intended to sign the protocol of ratification, including the instruments that included the Senate text. But I pointed out that the April 25 communique put us on notice that Panama accepts the text, but only according to the interpretation that Panama puts on the text. And Panama in the communique interprets the Senate changes in a way that makes them void of meaning.

Thus Mr. Bennet says that the communique "has no legal force." But Panama, in accepting the DeConcini amendment, for example, says that she accepts it only in a way that it has no legal force. Thus the stage is set for a confrontation between Panama and the United States. And who will win the confrontation?

Under international law, only Panama can win. Panama will be the sovereign over the Canal. The treaties do not obligate Panama to accept compulsory arbitration of any dispute. If we disagree, our obligations under the UN Charter and the OAS Charter prohibit us from using force to impose our interpretation.

Thus the real question is not whether the April 25 communique "has no legal force," but whether or not the communique gives us a correct understanding of how Panama interprets the documents that will be signed tomorrow. Mr. Bennet writes:

> In the Protocol of Exchange which President Carter and General Torrijos will be signing on June 16, Panama will accept all of those amendments, conditions, resolutions and understandings. These are the documents by which the parties will be bound.

Panama will be bound by the documents, but there will be no impartial judge to stipulate according to what interpretation Panama will be bound. All of Mr. Bennet's letters, all of President Carter's statements, even the Protocol of Exchange itself will have no force when the chips are down.

* * *

But Panama itself has raised doubts about her own good faith in accepting the Senate's changes. The communique, whether it is "legally binding" in the Senate Department's words, or not, is sufficient to impeach Panama's good faith in signing the Protocol of Exchange. The President would be fully justified in exercising his legal right to delay the exchange of ratifications until such time as Panama, in writing, withdraws the communique. In fact, he is not keeping faith either with the American people or with the U.S. Senate, if he proceeds to sign the protocol tomorrow.

The signing of the Protocol and the exchange of ratifications tomorrow is an action that is rash, unnecessary under law or treaty, and a challenge to the Constitutional rights of the Senate and the House of Representatives. The President seems to be seeking a whirlwind about to be born.

Mr. President, I ask unanimous consent that the text of the letter from Mr. Bennet, and the text of the State Department daily briefing for last Thursday be printed in the Record at the conclusion of my remarks.

The Honorable Jesse Helms
United States Senate June 14, 1978

Dear Senator Helms:

The President has asked me to reply to your letter of June 5, which enclosed the statement you made in the Senate on that day concerning the communique issued on April 25 by the Panamanian Foreign Ministry, and its bearing on the Panama Canal Treaties.

We do not regard the Panama communique as a repudiation or rejection of the Senate resolutions of ratification of the Treaties. The communique consists of a point-by-point description of the items contained in the resolutions, together with a commentary. It has no legal force.

Both the United States and the Panamanian instruments of ratification exchanged by the two countries contain the full texts of the amendments, conditions, reservations and understandings with which the Senate approved the Panama Canal Treaties. In the Protocol of Exchange which President Carter and General Torrijos will be signing on June 16, Panama will accept all of these amendments, conditions, resolutions and understandings. These are the documents by which the parties will be bound.

The Protocol will specify that the instruments delivered and exchanged by President Carter and General Torrijos shall become effective on April 1, 1979, unless the parties agree otherwise. If this date is not changed, the date of entry into force of the Treaties will be October 1, 1979. These dates have been fixed in conformity with the reservation to the Panama Canal Treaty introduced by Senator Brooke of Massachusetts and incorporated in the Senate's resolution

of ratification of the Treaty. As you will recall, that reservation provides that the exchange of ratifications

> shall not be effective earlier than March 31, 1979, and the Treaties shall not enter into force prior to October 1, 1979, unless legislation necessary to implement the provisions of the Panama Canal Treaty shall have been enacted by the Congress of the United States of America before March 31, 1979.

Once the Senate had given its advice and consent to the Treaties, the United States had completed its political decision to accept them. To delay in delivering the instruments of ratification might have given rise to doubts about our good faith in pursuing our relations with Panama and with other American Republics in the spirit of the Treaties. Moreover, it seemed desirable, in this way, to initiate a period of orderly planning for the transition to the new relationship which will exist between the United States and Panama under the Treaties. With the ratification ceremonies completed, both countries can proceed with certainty to prepare for the entry into force of the Treaties, next year.

Obviously, it will never be possible to achieve a complete identity of interpretation with respect to every one of the complicated provisons embodied in the Panama Canal Treaties, the ancillary agreements, the annexes and other notes, and the instruments of ratification. We cannot on that account fail to proceed conscientiously to carry out the decisions of the two countries, reached through their respective constitutional processes. As the Treaties come into effect, some difficulties will certainly arise. We are confident that, with the same good faith and persistent effort evidenced by both sides during the Treaty negotiations, they will be surmounted.

Sincerely,
DOUGLAS J. BENNET, JR.
Assistant Secretary for
Congressional Relations

Enclosure:
Correspondence returned.

**The Panama Canal Treaties***

MR. HELMS: Mr. President, this morning I sent a letter to President Carter, respectfully expressing the hope that he will resolve the differences in interpretation between the United States and Panama before any irreversible steps are taken to ratify the Panama Canal treaties, and I ask unanimous consent that it be printed in the RECORD at this point.

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*CONGRESSIONAL RECORD, 95th Cong., 2nd Sess. Vol. 124, No. 84, Monday, June 5, 1978, pp. S 8495 et seq., *passim.*

There being no objection, the letter was ordered to be printed in the RECORD as follows:

WASHINGTON, D.C.,
June 5, 1978

HON. JAMES E. CARTER,
*The White House,*
*Washington, D.C.*

DEAR MR. PRESIDENT: I am sending to you the text of the statement which I will deliver today on the Senate Floor with regard to the proposed exchange of the instruments of ratification of the Panama Canal treaties.

The purpose of the speech is to document in detail the intention of the Senate in approving six key amendments to the resolutions of ratification of the treaties, contrasting the documented Senate intention with the interpretations placed upon those amendments by the Panamanian Foreign Ministry communique of April 25, 1978.

The Foreign Ministry's communique is Panama's official explanation of its stand on the treaties to the Panamanian people. As such, it stands as part of the public record. The Panamanian communique goes to great lengths to repudiate the Senate's work on the six key amendments—either by outright rejection, or by interpreting the amendments in a fashion contrary to the Senate's intention. It is plain that fundamental disagreements still exist between Panama and the United States.

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If, at this juncture, the United States accepts the Panamanian signature on the protocols of ratification, the implication would be that the United States also accepts Panama's interpretation of the six Senate amendments in question. Since most of the Senate sponsors of those amendments conditioned their acceptance of the whole treaties on passage of those changes, the Executive Branch has a special obligation to ensure complete acceptance of the Senate's intentions. Unless the communique is withdrawn, with written assurances that Panama understands the Senate's intentions, the only alternatives left are to ask for another plebiscite in Panama on the Senate's text, or to return the treaties to the Senate for reconsideration of Panama's interpretations.

Mr. President, you and I did not agree on the treaties, but I know that we surely agree on the need to make sure that the United States and Panama see eye-to-eye on the meaning of the treaties.

Sincerely,
JESSE HELMS.

**Panama Repudiates Senate Changes in Canal Treaties**

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MR. HELMS: Mr. President, President Carter and Gen. Omar Torrijos are making plans to exchange the instruments of ratification of the Panama Canal treaties about 10 days from now; yet Panama has put itself on public record as repudiating virtually all the substantive changes which the U.S. Senate voted to add to the treaty documents.

This repudiation took the form of a 25-page official communique issued by the Panamanian Foreign Ministry on April 25. It is a formal statement analyzing the various amendments, reservations, and understandings one-by-one. Although superficially addressed to the Panamanian people, it is evidently the declaration of Panama's stand on the treaties which Torrijos promised to President Carter in their exchange of letters on March 15.

Although virtually unpublicized in this country, the document was published in Spanish on April 26 in the Panamanian newspaper La Estrella De Panama. It was translated into English and published as a supplement to the Foreign Broadcast Information Service, published by the Department of Commerce, on May 1.

In the communique, Panama sharply criticizes five reservations and one understanding—the very Senate amendments which most observers have credited with winning over the additional five or six supporters which the treaties needed for approval. Panama's repudiation ranges from outright rejection to elaborate "interpretations" which are diametrically opposed to the Senate's intention in passing the amendments.

Therefore, Mr. President, even if Panama accepts the amendments by signing the protocols of ratification, Panama has put the world on notice that she accepts them only according to her own interpretation—an interpretation that virtually empties the Senate changes of any significant content. The differences between the Senate's intent, as expressed in the treaty debates, and the Panamanian interpretation is so great that the potential for disputes, acrimony, and dissension will be vastly increased by ratification of the treaties. Once Panama assumes sovereignty over the canal, the United States will either have to acquiesce in Panama's demands, or withdraw early. We will be mousetrapped.

Indeed, the communique itself speaks of further struggles, further negotiations to shorten the life of the relationship with the United States.

Ironically, Mr. President, the treaties could not have passed without the very Senate amendments which Panama now repudiates. Most of the Senate sponsors of these changes announced publicly that their support of the treaties was conditioned upon acceptance of the changes in question. Without the

votes of the sponsors, there would have been five or six fewer votes for the treaties themselves. And, of course, it is a matter of record that each treaty passed with only one vote to spare.

The communique thus calls into question Panama's good faith in proposing to sign protocols of ratification when the parties are so far apart in thie understanding of the obligations imposed. It places a special burden on President Carter to resolve the differences before any irrevocable steps are taken to ratify the treaties. It is a settled point of international law that the exchange of instruments of ratification is a discretionary act on the part of the President. As is well understood, Senate approval of a resolution of ratification does not constitute ratification; the exchange of instruments constitutes ratification. Even after the Senate approves its resolution, the President still may withhold ratification if, in his judgment, circumstances warrant such a grave step.

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The Foreign Ministry communique repudiates some of the basic conditions imposed by the Senate, and speaks of new negotiations and struggles after ratification to shorten the treaties' term. It repeats the threat of violence against the canal if Panama's desires are not fulfilled.

These conditions point to a fundamental failure of the negotiating and ratification process. They leave the President with few prudent options. President Carter can send the Senate version of the treaties back to Panama and ask for a second plebiscite to insure popular acceptance of the Senate changes. He can send the treaties back to the Senate for reconsideration with Panama's interpretations. Or he can withhold ratification until further negotiations produce a protocol of ratification which concretely rejects the disputed Panamanian interpretations. Mere formal acceptance of the Senate text is not enough as long as Panama maintains the Foreign Ministry communique as its official interpretation of the treaties for the Panamanian people.

Although no option is without its disadvantages, the worst option would be to proceed with the proposed exchange of ratifications next week between the dictator Torrijos and the President of the United States, as long as a fundamental disagreement exists in interpretation. If we accept Panama's signature under the circumstances, it means that we accept Panama's interpretation.

The communique itself outlines Panama's view of the legal status of the treaties at the present time:

> We can assert that, regardless of the term used, what matters is if the condition, reservation, amendment or declaration made by one party to the other modifies or changes what has been agreed to by the plenipotentiaries. If that change has not been made, it is unquestionable that the treaty has not been ratified but, rather, that a counteroffer has been made by one party which the other is at liberty to reject,

modify, or approve. Only if it approves the counteroffer is the consent or perfecting of the wish of both parties to obligate themselves realized.

Mr. President, I ask unanimous consent that the communique of the Panamanian Foreign Ministry be printed in the Record at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

MR. HELMS: Mr. President, a careful reading of the Panamanian Foreign Ministry communique demonstrates conclusively that Panama has not given consent to the changes imposed by the Senate. Rather, Panama regards the Senate changes as a counteroffer which Panama is at liberty to reject, modify, or approve.

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**I. The Communique's Rejection of Six Changes**

The communique of the Panamanian Foreign Ministry is 25 pages long, and contains long passages which present an extraordinarily strident tone for a diplomatic instrument. Nevertheless it is an instrument which must stand as part of the official documentation of the treaties. In any interpretation of the treaties, or in any subsequent dispute over intention or meaning, the communique will stand as a pivotal document.

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With the completion of the Senate's proceedings in the United States, the Foreign Ministry, complying with orders from His Excellency President Demetrio B. Lakas and His Excellency Chief of Government Brig. Gen. Omar Torrijos Herrera, now undertakes to fulfill its duty of explaining to the citizenry the juridical scope of the resolutions of the Senate and setting forth its stand concerning the Senate's decision.

If Panama were in complete agreement with the actions of the Senate, there would be no need for "setting forth its stand."

The plain fact is that Panama is rejecting the Senate's significant changes precisely because they are significant. The key points rejected by Panama are as follows:

The Nunn Reservation to the Neutrality Treaty, modifying Article V so as to permit negotiations for the stationing of U.S. troops in Panama after the year 2000; Panama says, "With total emphasis, the Foreign Ministry declares that Article V cited previously has not been changed."

The DeConcini Reservation to the Neutrality Treaty authorizing U.S. troops unilaterally to enter Panama to put down a threat to the neutrality of the Canal. Although the subsequent leadership amendment to the Panama Canal Treaty merely restated long-standing U.S. policy on intervention, Panama says: "It is necessary to stress that the Senate's definition of U.S. policy in this reservation covers both treaties, which are mentioned specifically in the reservation, so that there would not be the slightest doubt that the DeConcini amendment added to the Neutrality Treaty would not continue in force."

The Hollings-Heinz-Bellmon Reservation to the Panama Canal Treaty, providing that the U.S. is not obligated to pay any outstanding balance under the annual $10 million contingency payment (Article XIII, 4 C) when the Canal is turned over in the year 2000. Administration officials testified that the contingent payment would not be included in the estimated toll base, would never be earned, and never paid. Panama states it to be her understanding that the contingent payment would be included in the toll base, would be paid in subsequent years if not earned in a particular year, and that "Paragraph 4 C is not symbolic or worthless; the two countries, in good faith, must give it practical content."

The Brooke Reservation, providing that the instruments of ratification be exchanged effectively not earlier than March 31, 1979, and the treaties not enter into force prior to October 1, 1979, instead of being the earliest possible date, is "the deadline for the treaties' entry into force."

The Cannon Reservation that the Panama Canal Commission reimburse the U.S. Treasury for interest on investment and amortization of assets. Although all financial studies have shown that the Canal cannot generate enough revenue to make such payments, Panama says that "this reservation does not alter what was agreed upon. To the extent that the United States does not violate the principle of honoring the treaties in good faith, Panama cannot present claims to the United States.

The Danforth Understanding that toll rates need not be set at levels to cover payment of the contingency payment. Panama threatens violence if the Danforth Understanding prevails: "To the extent that the Panamanian people are satisfied with the canal administration due to the products they derive from it, they will continue protecting their canal. But if a stingy spirit prevails, aggravating the injustice suffered by Panama since 1903, then a circle of friendship will not have been built around the canal, but rather one of hatred, with possible grave consequences if a crisis occurs, which the national government would be the first to deplore."

Mr. President, the attitude of Panama on any one of these points would be enough to invalidate the agreement. I repeat that Panama has a right to reject the agreement if she so desires; but the President has no right to ratify on the basis of Panama's conditions without once more sending it back to the Senate. With Panama's understanding of the treaties now on the record, it is clear that these are not the treaties which the Senate approved.

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As already pointed out, the communique is a carefully premeditated statement by Panama's legal experts, issued only after authorization by the President and the head of state of Panama. These contradictions cannot be allowed to stand without resolution, or the future operation of the canal and our continuing relationship with Panama will be placed in grave jeopardy. The issue is important enough to analyze each of the affected Senate amendments, the legislative history, and the context of Panama's objections.

### A. *The Nunn Reservation to the Neutrality Treaty*

The Nunn reservation was passed by the Senate on March 15, 1978, by a vote of 82 to 16, as an amendment to the resolution of ratification of the Neutrality Treaty. The substantive portion reads as follows:

> Nothing in this Treaty shall preclude Panama and the United States from making, in accordance with their respective constitutional processes, any agreement or arrangement between the two countries to facilitate their performance at any time after December 31, 1999, of their responsibilities to maintain the regime of neutrality established in the Treaty, including agreements or arrangements for the stationing of any United States military forces or maintenance of defense sites after that date in the Republic of Panama and the United States may deem necessary or appropriate.

The Nunn reservation was deemed necessary because of Article V of the Neutrality Treaty, which reads as follows:

> ARTICLE V
>
> After the termination of the Panama Canal Treaty, only the Republic of Panama shall operate the Canal and maintain military forces, defense sites and military installations within its national territory.

On its face, Article V prohibits the stationing of any military forces not maintained by Panama; obviously that would include U.S. military forces as well. Although the Neutrality Treaty is of permanent duration; that is, in perpetuity, the treaty would have to be renegotiated and reratified to enable the United States to maintain military forces in Panama, even if the Panamanian Government so desired. The Nunn reservation would avoid that uncertain and unsettling process, allowing a mere government-to-government agreement. As such, it was a considerable softening of the ironclad language of Article V.

### 1. *The Intent of the Nunn Reservation*

The Nunn reservation was regarded as a significant change, both by its sponsors and by the treaty floor managers. On March 14, Senator Nunn said:

> I have sought to strengthen the treaties through amendment. As I stated last November, I could not support the treaties as originally submitted to the Senate last November. The Treaties' vague and equivocal language concerning U.S. defense rights beyond the year 1999 and the priority passage of U.S. vessels in times of emergency would have laid the foundation for conflicting interpretations. . . .
>
> Accordingly, I join many of my colleagues in cosponsoring the amendments of Senators Byrd and Baker. . . .
>
> I am also dissatisfied with Article V of the Neutrality Treaty, which prohibits the United States from retaining any military installations in Panama beyond the year 1999. In my view, a small but select U.S. military presence in Panama beyond 1999 would be highly desirable for both of our nations and for all who use the Canal. . . .
>
> Accordingly, I have sponsored a change in the treaties specifying that the United States and Panama in the future, could, by mutual consent begin negotiations for an extension of a U.S. military presence in the Canal Zone beyond the year 1999. I have been assured by both the leadership of the Senate and the executive branch that this significant change is now acceptable. . . .

On March 15, the distinguished assistant treaty manager, Mr. Sarbanes, responded in kind:

> The reservation he has offered does provide the opportunity that would be to some extent closed under the existing language of the treaty because then to accomplish this

objective you would have to have actual amendments to this treaty or a new treaty; whereas, the reservation which the Senator from Georgia has offered would make it possible to act by mutual agreement other than a treaty arrangement.

On the basis that it was a significant change, many Senators voted to approve the treaty.

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Clearly, the Senate was not just going through an exercise; the Senate thought it was doing something important.

2. *Necessity for Panama to Accept the Nunn Reservation*

In the light of Panama's rejection of the proposition that Article V was modified by the Nunn reservation, it is important to note in the legislative history that the Senate held extensive debate concluding that the treaty could not be ratified unless Panama accepted the Nunn reservation. Both opponents and proponents of the treaties were in complete agreement on this point: The instruments and ratification cannot be exchanged unless Panama agrees to the Nunn reservation—and of course, by implication, with any and all reservations. The exchange began with Senator Dole on March 15:

MR. DOLE: I guess the question is, what if the Senate approves the ratification and Panama rejects? What if the Senate wants to establish this treaty and the Panamanian people refuse to conclude a protocol and the change called for in this reservation, would the ratification of the treaty thereby be vitiated?

MR. NUNN:The Senator from Georgia stated very clearly that legally, as the reservation itself expressed, unless Panama agreed to this reservation the instruments of ratification of the treaty would not be exchanged. This reservation also specified that it has to be done by the conclusion of a protocol of exchange to be signed by the authorized representatives of both governments. So, the Senator from Georgia understands that unless the reservation is accepted by the Government of Panama, there will be no treaty . . . If the floor manager has any different interpretation, I certainly think he should make it known now because that is my understanding.

* * *

3. *Panama's Rejection of the Nunn Reservation*

If the Nunn reservation does not change the scope of Article V, then no reservation can be said to have any effect upon any treaty. The whole nature of a reservation is to make a substantive change. The fact that a reservation is an amendment to the resolution of ratification and is to be incorporated into the protocol of exchange, rather than into the Article V itself does not change its practical effect. Therefore, the judgment of the Foreign Ministry's communique on the Nunn reservation can be considered as nothing other than a rejection of the effect of the reservation:

> With total emphasis, the Foreign Ministry declares that Article V cited previously has not been changed.

The communique goes on to add the following cryptic note:

> All states have the power to negotiate without limitations except those imposed by the UN Charter.

But negotiation is not the issue in the Nunn reservation; the issue is whether Article V permits agreements for U.S. troops to remain in Panama after 1999 without negotiation of new treaties. If Article V does not permit such nontreaty agreements, then we could face a serious confrontation on an issue which is of prime importance to the Senate, an issue which, indeed, could have defeated the treaties. If Panama does not accept the Nunn reservation as a substance change in Article V, there should be no treaty.

* * *

The Nunn reservation imposes no additional burden upon Panama. However, it significantly alters the effect of Article V to permit an exception to Article V in the future, if both parties agree. For the Panamanian Government now to declare "with total emphasis" that Article V "has not been changed" is to make a mockery of the Senate's proceedings. Indeed, it is more than that; it is a repudiation of the reservation itself.

B. *The DeConcini Reservation to the Neutrality Treaty*

Mr. President, the DeConcini reservation No. 83 was passed by the Senate on March 16 by a vote of 86 to 13, as an amendment to the resolution of ratification of the Neutrality Treaty. The substantive portion of it was as follows:

> Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.

Although this reservation is entirely consistent with the purposes of the Neutrality Treaty and the responsibilities of the United States under the treaty, the amendment made explicit a point that was before only implicit. Panama chose to take offense at the Senate's action and the Senate's debate, and the partisans of Panama felt it necessary to sponsor a so-called "leadership amendment" to the Panama Canal Treaty restating U.S. policy.

The Senate passed the "leadership amendment" to the Panama Canal Treaty on April 18, by a vote of 73 to 27. Cosponsored by the distinguished

majority leader, Mr. Byrd, the distinguished minority leader, Mr. Baker, and by Senators DeConcini, Church, Sarbanes, Sparkman, Javits, Leahy, and Gravel, the substantive portion read as follows:

> Pursuant to its adherence to the principle of nonintervention, any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure, and accessible, pursuant to the provisions of this Treaty and of the Neutrality Treaty and the resolutions of advise and consent thereto, shall be only for the purpose of assuring that the canal shall remain open, neutral, secure, and accessible, and shall not have as its purpose nor be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity.

There is, on the surface, no conflict between the language of the two reservations. Both are limited solely to actions designed to open the canal or to keep it open, pursuant to the regime of neutrality which both nations are pledged to maintain. The scope of the DeConcini resolution is limited to actions taken "to reopen the canal or restore the operations of the canal."Although the DeConcini reservation authorizes the United States to "take such steps as it deems necessary," the authority thereby granted is not unlimited but rather is strictly constrained by the stated purpose; namely, "to reopen the canal or restore the operations of the canal."

Indeed, if anything, the leadership amendment to the second treaty goes beyond anything the DeConcini reservation threatened, for it goes beyond the question of keeping the canal "open" and adds three new substantive grounds for action; namely, keeping the canal "neutral," "secure," and "accessible." It is thus far more wide-ranging in offering motives for action, gives a far broader range for interpretation of any given set of circumstances affecting the canal's operations, and offers a blank check for anything the United States may wish to do. For if the logic of the leadership amendment is examined closely, its plain meaning is that both parties have agreed in advance that any U.S. action, including intervention in Panama's internal affairs, shall not be interpreted as "intervention" so long as such intervention has as its purpose keeping the canal open, neutral, secure, and accessible.

Thus the leadership amendment to the second treaty in no way cancels or amends the original DeConcini reservation. Although it appears to offer a legal fiction to redefine intervention as "non-intervention," it does nothing to make the DeConcini reservation inoperative in any way. And, especially, it leaves intact something to the legal status of any action, including military action, that the United States may wish to take in the future for the purpose of keeping the canal open.

It leaves intact the DeConcini reservation's use of the word "independently." The DeConcini reservation says that the United States and Panama "shall each independently take such steps as it deems necessary." On this key word

hinges the right of the United States to take unilateral action to fulfill our responsibilities under the treaties. Without that word, our security rights with regard to the canal are worthless. Without that word, the withholding of consent by Panama is sufficient to make any action we take illegal.

The administration constantly maintained that the right of independent action was implicit in the treaties. When doubts arose, the administration maintained that the right of independent action was implicit in the so-called "leadership amendments" to the first treaty. When the argument of implicitness was still not enough to secure the last two or three votes needed for approval, the administration permitted the distinguished Senator from Arizona to use the word "independently" in his reservation, thus making explicit at last the central issue in the defense arrangements.

It is, therefore, vital that Panama accept the DeConcini reservation for there to be a meaningful agreement on central treaty issues. But Panama insists that the DeConcini reservation is somehow canceled by the reservation made to the second treaty. The Panamanian Foreign Ministry communique states flatly:

> It is necessary to stress that the Senate's definition of U.S. policy in this reservation covers both treaties, which are mentioned specifically in the reservation, so that there would not be the slightest doubt that the DeConcini amendment added to the Neutrality Treaty would not continue in force.

If the President of the United States does not uphold the full force and effect of the DeConcini reservation for "independent" U.S. action to maintain the neutrality of the canal, then he will be breaking the very commitment upon which the treaty structures were approved by the Senate.

1. *The Need for a Unilateral Right to Defend the Canal*

The central issue with regard to U.S. defense rights in the Panama Canal treaties is the question of the unilateral right to defend the canal. From the very beginning, the negotiators were faced with a basic contradiction: The key issue for Panama was the reversion of the sovereign rights exercised by the United States; the key issue for the United States was the right to defend the canal unilaterally.

* * *

But apparently, this is precisely what the Panamanians still refuse to accept as part of the treaty instruments. If President Carter accepts the Panamanian understanding that the DeConcini reservation does not continue in force, by his act of signing the protocol of exchange, then he will have made a major concession that was not in the mind of the Senate.

What the negotiators have done by sidestepping the issue of sovereignty is to continue the fatal ambiguity of the 1903 treaty. For many experts far more competent in the field of international law than I have concluded that the 1903

treaty conveys the substance of sovereignty, the attributes of sovereignty, indeed, the total exercise of sovereignty. By the same treaty, Panama surrendered the same substance, the same attributes, the same exercise of sovereignty. It is a reasonable conclusion of law that sovereignty was conveyed; but the treaty is unique in that it is silent on the crucial point.

During our years ofbconstruction and operation, the Unit but the treaty is unique in that it is silent on the crucial point.

During our years of construction and operation, the United States possessed a position of strength. If sovereignty is the exercise of supreme power in a defined territory, then the United States exercised full sovereignty. Panama complained, but she had no position either in law or in power to complain. The United States never once acknowledged that Panama possessed sovereignty concurrently with the United States; even the notion of residual sovereignty meant only the claim of Panama to reassume sovereignty if we ever gave it up.

* * *

So long as the United States exercises sovereign powers in the Canal Zone, Panama has no legal right to object to our actions in that territory. Conversely, once Panama exercises sovereign powers in that territory, we have no legal right to object. The logical box is airtight.

That is why it was important, in my judgment, for the United States to maintain that the 1903 treaty was a cession of sovereignty en bloc, as well as a transfer of territory. Without the successful assertion of such rights, we would have no ground for the successful operation and defense of the Canal.

Similarly, once the negotiators began with the premise that sovereignty was to be conceded to Panama, the United States shifted to a position of weakness. The best that could be hoped for was an explicit concession by Panama to the United States of the unilateral right to defend the Canal.

* * *

The method the negotiators chose was to carefully avoid making any explicit recognition of a unilateral right of defense. The rights of both nations were stated in parallel form, as though both would always operate concurrently and cooperatively. The treaties simply omitted considerations governing the operation of these rights if it should happen that they would be exercised in opposition to each other. The negotiators apparently hoped that such disagreements would never arise; or perhaps they simply allowed for the legal effect of the doctrine of sovereignty, namely, that the will of Panama would supersede the rights of the United States.

The proponents of the treaties constantly interpreted the parallel rights language of the treaties as a unilateral right; but they assiduously opposed any attempt to have unilateral rights written into the text. The desperate acceptance

of "independently" in the DeConcini reservation, however, smoked out Panamanian discontent over any legal commitment to U.S. unilateral rights.

* * *

The report of the Committee on Foreign Relations, and the speeches of the distinguished majority and minority leaders all emphasized that the United States would have the rights of unilateral action. Yet the text itself did not specify that each nation could take the steps which it deemed necessary. The silence of both the leadership amendments and the treaty itself on the right of unilateral action leaves our rights to be governed only by the context, namely, the context of Panama's sovereignty.

* * *

One Senator, however, who was not satisfied was the distinguished Senator from Arizona, Mr. DeConcini. On March 16, he stated on the Senate floor:

* * *

> I have been . . . bothered by the possibility that internal Panamanian activities might also be a threat to the waterway, should we give it up. Labor unrest and strikes; the actions of an unfriendly government; political riots or upheavals—each of these alone or in combination might cause a closure of the Canal.

The distinguished Senator's analysis was exactly right. He had put his finger upon the contradiction in the administration's position in trying to distinguish between the internal affairs of Panama and threats to the neutrality of the canal. The administration failed to face the very real possibility that there might be no distinction between the two.

* * *

2. *Response to Panamanian Objections*

As early as March 16, the day on which the DeConcini reservation was passed, newspaper reports began to circulate that the Panamanians strongly objected to it. Even before the debate on the DeConcini reservation began, the distinguished Senator from Michigan, Mr. Griffin, raised the issue:

> Mr. President, I was interested to learn of a report this morning by CBS Radio—and television, I take it, about the fact that the Ambassador of Panama called at the White House on yesterday and let the President and Secretary Vance know that General Torrijos is extremely upset over Senate additions to the treaties, as I understand the report.
>
> I also understand, on the basis of the report that the President called General Torrijos on yesterday and attempted to calm him down and to assure him that, really, what the Senate was doing here was not making any significant changes in the treaty.
>
> I can only read between the lines, Mr. President, but I suspect that the concern is not only about what the Senate already has done but also what the Senate may be about to do this afternoon. I refer, in particular, to an amendment to be offered by the Senator from Arizona, (Mr. DeConcini). . . .

This, of course, would fly in the face of the Panamanian interpretation of the Neutrality Treaty, which is that the United States cannot come in with military forces to defend the neutrality of the Canal unless it is with the permission of the Republic of Panama.

* * *

Under date of March 15, the day before the DeConcini reservation was accepted, President Carter wrote [to General Torrijos]:

In the Senate debate, we have fortunately been able to prevent any amendments to the Treaty other than the so-called "Leadership" amendments to Articles IV and VI. These incorporate exactly the terms of the Statement of Understanding published after our conversation of October 14.

In considering its Resolution of Ratification of the Treaty, the Senate will almost certainly attach a number of reservations, conditions or understandings reflecting certain of its concerns. We have made every effort and have been successful to date in ensuring that these will be consistent with the general purposes of our two countries as parties to the Treaty. I hope you will examine them in this light.

* * *

The substance of the telephone conversations has never come to light. Yet some hint of the representations which the President made to Torrijos is contained in Torrijos' letter of reply. He wrote, under the same date of March 15:

In your letter and conversation you informed me that the Senate will introduce some reservations, but that they will not alter nor detract from the content of what was agreed upon in the Neutrality Treaty and in our Declaration of October 14, 1977.

* * *

For Panama any reservation would be unacceptable which blemished our national dignity, which altered or changed the objectives of the Treaty or which were directed at hindering the effective exercise of Panamanian sovereignty over all of its territory, the transfer of the Canal and military withdrawal on December 31, 1999. For that reason, I received with great gratitude your words that these objectives will absolutely not be changed by means of amendments or reservations. . . .

* * *

### 3. *Panama's April 25, Repudiation of the DeConcini Amendment*

It can be seen from the legislative history that the DeConcini reservation was important to the U.S. Senate's approval of the Neutrality Treaty, a treaty whose ratification is linked legally to the approval of the Panama Canal Treaty as well. Moreover, it is also clear that approval of the Panama Canal Treaty was fundamentally based upon the concept of unilalteral U.S. defense rights for the canal, the very point which the DeConcini reservation made explicit.

Moreover, there was very little disagreement between opponents and proponents of the treaties on this point. Both accepted the fundamental principle of unilateral defense rights; the debate concerned whether or not these rights

were properly protected by the treaties and the accompanying reservations. It is unquestionably clear that neither treaty would have been approved if there had been any doubt that the treaties gave us unilateral defense rights.

Moreover, no one reading the legislative history can claim that the DeConcini reservation was in any way modified, cancelled, repudiated, or superseded by the new leadership amendment. When the DeConcini reservation was first passed, the speech of the distinguished Senator from Arizona made clear that he considered it to cover only threats to the canal, not Panama's internal affairs. The distinguished floor leader made the same point.

The new leadership amendment merely restated what was already in the treaties, without resolving the issue of what happens when Panama's internal affairs become the threat to the canal's operations. However, the implication of the language of the new leadership amendment, and the legislative history quoted earlier, show conclusively that the United States believes that it has a right to move in to protect the canal from any threat, without Panama's consent.

Any attempt by Panama, therefore, to repudiate the DeConcini amendment, to minimize it, or to reject its force therefore strikes a blow to the heart of the understanding which the Senate believed to exist between Panama and the United States. Yet this is what Panama said in the Foreign Ministry's communique:

> This is what has commonly been called the DeConcini reservation. Obviously its scope departed from the Torrijos-Carter declaration because it eliminated the obligation of the United States not to interfere in the internal affairs of Panama and to respect the political independence and territorial integrity of Panama.
>
> * * *
>
> As abominable as the DeConcini reservation were the baseless explanations of the same senator, who seeks to revive U.S. intervention in the internal affairs of Panama. Fortunately, the Senate approved the 18 April resolution . . . which reaffirms respect for the principle of nonintervention in the internal affairs of the countries of America.
>
> * * *
>
> With this last Senate resolution, it is evident that the United States has reaffirmed its international commitments in light of the UN and OAS Charters. With it the DeConcini reservation has been rid of its imperialistic and interventionist claws, and the enforcement of the principle of nonintervention has been reestablished.
>
> * * *

Mr. President, the record shows conclusively that the Government of Panama does not accept the condition added to the Neutrality Treaty by the Senate, a condition that was added as a means of obtaining passage of the resolution of ratification. Moreover, this condition merely made explicit a principle that all factions in the treaty debates agreed to, namely, the right of

unilateral military action against any threat to the canal, even if that threat arose from the internal affairs of Panama itself. Neither the DeConcini reservation itself, nor any Senator in the debate demanded a right of intervention per se; but the whole Senate did demand the right to act to protect the Canal against any threat. In rejecting the DeConcini reservation, Panama has rejected the foundation upon which the treaty structure was built.

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